The district court found that race was not a factor in the review of presumptive admit files. FF 75, Pet. at 46a. There were very few racial minorities in the group and statistical analysis revealed no significant racial pattern in decision-making for this group. Trial Ex. A-9. Accordingly, the district court found that appellant Rock—who was a presumptive admit candidate in 1995 and was rejected after committee review—had failed to show that race was a factor in her rejection. FF 75, Pet. at 46a.

The second stage of the process involved candidates whose index scores placed them outside the presumptive admit group. These were referred to as the "presumptive deny" or "discretionary" group. FF 43, Pet. at 37a. The applicants in this group were reviewed by Assistant Dean Sandra Madrid, another of the respondents. As admissions dean, her job was to admit, deny, or refer applicants to the admissions committee. FF 43, Pet. at 37a-38a. In each year, Dean Madrid's practice was to read files starting with the lowest index scores and reading to the highest. She did not separate files for review based on race and applied the standards set forth in the admissions policy to each applicant, regardless of race. FF 60, Pet. at 42a; FF 73, Pet. at 45a; FF 80, Pet. at 47a.

In the third stage of the process was review of the files referred to the admissions committee. The admissions committee consisted of six professors and three students. FF 45, Pet. at 38a. Each member of the admissions committee would rank candidates on a scale of three to fifteen, and then the Law School would make additional offers, based solely on

committee rankings and sometimes residency. FF 46-47, Pet. at 38a-39a. Applicants referred to the admissions committee were considered more qualified than the applicants who were not referred. Both minorities and non-minorities were referred to the committee in each year and admitted as a result of committee review. FF 82(j), Pet. at 49a-50a.

Finally, in the fourth stage of the process, candidates reviewed by the admissions committee, but not ranked so highly as to be admitted initially, were placed on a waiting list, from which additional offers were made over the course of the spring and summer. FF 48, Pet. at 39a.

C. Results Of The Process

The Law School's admission policy and practices produced a highly qualified and diverse student body which, as measured by grades and test scores, had relatively small differences in academic qualifications across racial groups. Trial Ex. A-9; FF 82(i), Pet. at 49a. Throughout the process, substantial weight was given to non-racial diversity factors. FF 83, Pet. at 51a. As a result, many white applicants, who would not have been admitted based on their grades and test scores alone, were admitted based on diversity considerations. The number of these white "diversity" admits far exceeded the number of minorities admitted. Trial Ex. A-5.

Despite a relatively large pool of minority applicants (averaging 28% during the years studied[2]), elimination of race as a factor in admissions would have caused minority enrollment

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[2] Defs.' Trial Ex. A-9.

(which averaged 32%) to decrease to about 14%, almost all of whom would have been Asians, and thus only a token number of African-Americans, Hispanics, and Native Americans would have been enrolled. Trial Ex. A-011. Elimination of race as a factor would have caused only a small increase in the average white applicant's chances of admission, i.e., between 1994 and 1996, the average white applicant's chances of rejection were between 89% and 94%. Without race as a factor, the chances of rejection would have ranged from 85% to 86%. Trial Ex. A-011.

II. Proceedings Below

A. Initial Proceedings In The District Court And Court of Appeals

Smith, Rock, and Pyle (collectively, Smith) were among thousands of applicants that the Law School did not select to fill approximately 165 openings in each of its entering classes for the years 1994-1996. They brought suit in 1997 claiming that the Law School discriminated against them on the basis of race, in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and 42 U.S.C. §§ 1981 and 1983. Petitioners also claimed a violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d). Petitioners sought damages and certification of a class for declaratory and injunctive relief. The district court granted class certification.

Prior to trial, the district court made two significant rulings. First, it held that Washington Initiative 200 (codified as Wash. Rev. Code § 49.60.400(1)), which prohibited granting

"preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of . . . public education" and the Law School's consequent abandonment of the race-conscious admissions mooted Smith's prospective claims. Accordingly, it decertified the class and ordered the matter to proceed to trial solely on the claims for damages. Second, it held that Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), was binding precedent for the proposition that the narrowly tailored consideration for the purpose of fostering educational diversity was permissible.

Interlocutory review of these rulings followed, and the Ninth Circuit Court of Appeals affirmed the district court in all respects. *Smith v. Univ. of Washington, Law School*, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001).

B. Trial

The case returned to the district court for a bench trial. Pet. at 25a. The focus of the trial was to determine whether the "Law School's program was narrowly tailored to meet the requirements of *Bakke* for the years in question" and on the Law School's contention that none of the petitioners would have been admitted if race were eliminated as a factor in the process. Pet. at 27a. At the conclusion of the trial, the district court entered ninety-two Findings Of Fact and eighteen Conclusions Of Law. Pet. at 27a-59a.

The district court found that there was "no evidence that [the Law School] applied significantly disparate standards to applicants of different

races". FF 91, Pet. at 53a. The court found that the Law School considered racial as well as non-racial factors in the admissions process. Non-racial factors included "unusual life experiences, foreign language skills, geography, post-college work, advanced degrees, disabilities, achievements in athletics, business or the military, public service, and numerous other factors". FF 83, Pet. at 51a. The court found that "other diversity factors played an important role in the Law School's admissions decisions in all years for all applicants". FF 82(g), Pet. at 49a. The district court found that there was "no evidence that the persons admitted to the Law School in all years were not well-qualified applicants". FF 82(i), Pet. at 49a.

The district court concluded that "[c]onsideration of race in evaluating applications for admissions was necessary to achieve the goal of educational diversity at the Law School." Conclusion Of Law (CL) 7, Pet. at 55a. "Failure to consider race would have had the potential effect of denying many qualified minority applicants an offer of admission to the Law School." CL 7, Pet. at 55a.

The district court also found that the "Law School did not establish any racial 'quotas,' 'targets' or 'goals' for admission or enrollment". FF 52, Pet. at 39a. Indeed, the Law School "did not keep track of how many minority applicants were being accepted". FF 89, Pet. at 53a.

The court concluded that as "a result of the Law School's consideration of race and other diversity factors, each applicant was treated as an individual rather than as a mere stand-in for some

favorite group". CL 15, Pet. at 59a (internal punctuation omitted). Thus, the "consideration of race and ethnicity did not operate to insulate any prospective student from competition with other applicants". CL 11, Pet. at 57a. The trial court concluded that "[m]inority applicants were not set aside for separate evaluation but considered in conjunction with other applicants under the same review process." CL 12, Pet. at 57a-58a. Thus, the Law School "did not have a 'two-track' system for evaluating minority and non-minority applicants separately". CL 12, Pet. at 58a.

The district court ultimately concluded that the Law School's admission program for the years in question "was narrowly tailored to achieve the compelling state interest of educational diversity and [did] not violate federal law". CL 17, Pet. at 59a.

With respect to the Law School's contention that its consideration of race made no difference in the outcome of petitioners' applications, the district court found that petitioners Smith and Pyle would not have been admitted to the Law School under a race-neutral policy. FF 68, Pet. at 44a; FF 81, Pet. at 47a-48a. With respect to petitioner Rock, whose application was eliminated at the presumptive admit stage, the court found that race was not a factor in the Law School's consideration of applications at that stage and, therefore, "[r]ace did not play a substantial role in Rock's denial of admission to the Law School." FF 75, Pet. at 46a.

C. The Ninth Circuit Decision

Smith appealed the district court's decision to the Ninth Circuit Court of Appeals, which stayed

consideration of the case pending this Court's decisions in the Michigan cases. After *Grutter* and *Gratz* were decided, the Ninth Circuit concluded that the only thing "left for us to decide is whether the Law School's admissions program was narrowly tailored to meet the compelling interest of educational diversity during the three years in which the plaintiffs applied . . . in order to determine whether the plaintiffs might be entitled to damages". Pet. at 2a. The court carefully reviewed the University of Michigan Law School's (UMLS) "Harvard-type" admissions process that this Court sustained in *Grutter*. Pet. at 6a-12a. It concluded that "the Law School's admissions program comported with the criteria set forth in *Grutter*". Pet. at 13a.

The court held that the "Law School did not establish quotas, targets or goals for admission or enrollment of minorities". Pet. at 12a. Moreover, "the percentage of minorities varied each year in a manner inconsistent with the existence of a quota". Pet. at 12a. The court found that the "Law School's review of applications demonstrates the sort of highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment". Pet. at 12a. The fact that the "Law School also accepted nonminority applicants with grades and test scores lower than underrepresented minority applicants who were rejected, [showed] that the Law School seriously weighed many other diversity factors besides race that could make a real and dispositive difference". Pet. at 13a (internal punctuation omitted). Thus,

unlike the "the program found unconstitutional in *Gratz*, the racial and ethnic pluses here did not have the effect of making the factor of race decisive for virtually every minimally qualified underrepresented minority applicant". Pet. at 13a (internal punctuation omitted).

Smith attempted to "differentiate the Law School's program from UMLS's, focusing on three discrete aspects of the admission process". Pet. at 14a. First, Smith argued that during one or more of the relevant years, the Law School "provided an opportunity to some minority applicants to supplement applications through a so-called 'ethnicity substantiation letter'". Pet. at 14a. The Law School "sent the letter to some applicants who identified themselves as racial or ethnic minorities on the front page of their applications [t]o help ascertain whether the applicant's race or ethnicity should be considered a plus factor". Pet. at 14a. The Court of Appeals concluded that this letter "supports rather than undermines the constitutionality of the Law School's program". Pet. at 14a. This is because "the Law School used the letter to more narrowly tailor the awarding of a plus for an applicant's race or ethnicity by seeking more information about the role that race or ethnicity played in the applicant's life, rather than simply relying on the applicant's minority status as such." Pet. at 14a.

Second, Smith argued "that Asian Americans, who were given a slight plus for racial diversity, should not have been given a plus at all because the Law School could have attracted what the plaintiffs deem a 'critical mass' of Asian American students without a preference". Pet. at 17a. The Ninth

Circuit found several problems with this argument. To begin with, "it assumes that the category 'Asian American' is homogenous". Pet. at 17a. In fact, "applicants whose families or who themselves originated from the Philippines, Viet Nam, Cambodia, Taiwan and the People's Republic of China—to name a few countries of origin from which the Law School specifically sought applicants—have different cultures, backgrounds and languages, and thus would bring different experiences to the educational environment". Pet. at 17a. Moreover, the court found "that relying on percentages to define a critical mass may be distortive, particularly when dealing with small numbers". Pet. at 19a. For example, "7 to 9 percent of the Law School's 170-person class would be approximately 12 to 15 students. By contrast, 7 to 9 percent of UMLS's 350-person class would be approximately 25 to 32 students." Pet. at 19a. "Although the percentages are the same, the difference in actual numbers–12 to 15 as opposed to 25 to 32–may be more important when considering that the goal of a critical mass is to provide for meaningful numbers, or meaningful representation, such that minority students are encouraged to participate in the classroom and not feel isolated." Pet. at 19a.

Finally, Smith sought to distinguish the Law School's admissions program from the UMLS program by arguing "that the Law School created 'separate tracks' for white and minority applicants, pointing primarily to the referral in 1994 of white applicants with index scores of 195 and 196 to the Admissions Committee". Pet. at 19a-20a. This

separate review of minority students in 1994 was done because "the Law School wanted to make an early decision on minority candidates who were extremely well qualified based solely on their high index scores". Pet. at 20a-21a. Minority students with these qualifications were very rare and if the Law School was to have "a serious opportunity of trying to have them actually enroll at the law school . . . [it] had to try to communicate [its] eagerness by promptly admitting them and therefore not wait through the process basically of the group of applications that would come out of the admissions committee". Pet. at 21a. The Ninth Circuit concluded that "the separate review did not interfere with the Law School's ability to provide appropriate consideration of the white applicants". Pet. at 20a.

After the decision by the Ninth Circuit, Smith sought an extension of time to file a Petition For A Writ Of Certiorari to give new counsel an opportunity to review the case. Justice O'Connor granted the extension. Pet. at 60a. Smith filed her petition April 19, 2005.

REASONS FOR DENYING THE WRIT

I. The District Court's Findings Of Fact Preclude Any Relief

The district court's finding that race was not a substantial factor in the decision to deny petitioner Rock's application (Pet. at 46a) mandates the conclusion that she failed to make a claim under 42 U.S.C. § 1981, 42 U.S.C. § 1983, or Title VI (42 U.S.C. § 2000d). *Mt. Healthy City Sch. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). The district court's findings that petitioners Smith and Pyle

would not have been admitted even in the absence of consideration of race established a complete defense to liability under *Texas v. Lesage*, 528 U.S. 18, 21 (1999) (the "government can avoid liability by proving that it would have made the same decision without the impermissible motive").

Petitioners failed to assign specific error to these findings and did not make the showing required to invalidate the trial court's findings of fact.[3] Pet. at 3a n.1. Instead, their argument for reversal was focused on the premise that other aspects of the admissions process were invalid or that the admissions process might have been structured differently if race were removed as a factor. Pet'rs 9th Cir. Br. at 60-62. The district court and the Ninth Circuit held, however, that those other aspects (the use of "ethnicity substantiation letter" and referral of white applicants with certain index scores to the admissions committee) were not invalid. Pet. at 15a-16a, 22a, 24a; CL 12-13, Pet. at 57a-58a. Petitioners do not challenge these holdings here.

Smith argues that, notwithstanding the district court's finding of no liability, she is entitled to relief, because she meets the requirements for standing under *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993). She also argues that nominal damages may be recoverable under the rationale of *Carey v. Piphus*, 435 U.S. 247 (1978). Pet. at 23 & n.16. These arguments are unavailing.

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[3] *See* Fed. R. Civ. P. 52(a); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 484-85 (1985).

First, Smith's standing to bring this case is irrelevant after entry of findings that preclude liability. *Lesage*, 528 U.S. at 21 ("where there is no allegation of an ongoing or imminent constitutional violation to support a claim for forward-looking relief, the government's conclusive demonstration that it would have made the same decision absent the alleged discrimination precludes any finding of liability").

Smith's reliance on *Carey* is also misplaced, because *Carey* involved procedural due process rights, not an equal protection challenge. While *Carey* ventured that nominal damages may be appropriate where constitutionally required process was not afforded, even though the result would have been the same if the process had been afforded, the Court cautioned against extension of its reasoning beyond the procedural due process setting, stating:

> "[T]he elements and prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another. . . . [T]hese issues must be considered with reference to the nature of the interests protected by the particular constitutional right in question." *Carey*, 435 U.S. at 264-65.

While a constitutional injury may occur as the result of denial of a required process, even though the result would have been no different had the process been afforded, no constitutional injury occurs as the result of denial of a government benefit, when

no required process attends the denial, and where the result would have been the same absent the presence of an allegedly illegal factor. In the latter case, "[t]he constitutional principle at stake is sufficiently vindicated if [the plaintiff] is placed in no worse a position than if he had not engaged in the [constitutionally protected] conduct." *Mt. Healthy City Sch. Bd. of Ed.*, 429 U.S. at 285-86.

Petitioners here are in precisely the same positions that they would have been in absent the Law School's consideration. Accordingly, there is no relief that this Court can provide them. *Cf. Montana v. Imlay*, 506 U.S. 5, 6 (1992) (Stevens, J., concurring in the dismissal of the writ of certiorari as improvidently granted) ("[N]o matter which party might prevail in this Court, the respondent's term of imprisonment will be the same. At oral argument, neither counsel identified any way in which the interests of his client would be advanced by a favorable decision on the merits—except, of course, for the potential benefit that might flow from an advisory opinion. Because it is not the business of this Court to render such opinions, it wisely decides to dismiss a petition that should not have been granted in the first place." (Footnote omitted.)).

II. The Questions Raised Are Not Fairly Presented By The Record

A. Race-Neutral Alternatives

Smith argues that the Law School's admissions policy fails strict scrutiny with respect to consideration of a workable race-neutral alternative means of achieving diversity, because its faculty did not make an "affirmative finding" in this regard,

based on "evidence of record". Pet. at 10-11. These alleged requirements are not found anywhere in *Grutter* and, in any event, this claim was not raised in the courts below as a basis for invalidating the Law School's policy.

1. The Record In *Grutter*

Nearly all selective American law schools have used for many years a mix of LSAT, undergraduate grade point average, and more subjective factors, including racial and other forms of diversity, as admissions criteria. *See* Br. Amicus Curiae American Ass'n Law Schools, *Grutter v. Bollinger*, 539 U.S. 306 (2003). These schools have recognized that, largely because of persistent test score differentials between minority and non-minority applicants, application of conventional measures of qualification would result in exclusion of many capable minority applicants. *Id. See also* Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis Of The Consequences Of Abandoning Race As A Factor In Law School Admission Decisions*, 72 N.Y.U. L. Rev. 1 (1997). Prominent American law schools and their leaders have concluded that there are no reasonable race-neutral alternatives that would achieve the same balance of diversity and quality as race-conscious diversity plans. Wightman, 72 N.Y.U. L. Rev. 1; Br. Amicus Curiae American Law Deans Ass'n, *Grutter*.

The evidence concerning the University of Michigan Law School's (UMLS) consideration of race-neutral alternatives pointed to the same conclusion. The district court heard "some testimony from

witnesses who indicated that underrepresented minority students cannot be enrolled in significant numbers unless their race is explicitly considered in the admissions process". *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 852 (E.D. Mich. 2001). A member of the admissions committee, for example, testified that the committee was unaware of any viable alternatives to the consideration of race in admissions when it first drafted its race-conscious admissions policy, and it became aware of no viable alternative thereafter. Defs.' Post-Trial Mem. Respecting Proposed Findings Of Fact And Conclusions Of Law No. 02-241 at 27. The committee member supported this conclusion at the trial by relying on Prof. Wightman's 1997 study. *Grutter*, 137 F. Supp. 2d at 852. The law school's former dean and an expert witness also confirmed that race-neutral alternatives in school admissions had failed elsewhere. *Id.*

On appeal, the Sixth Circuit additionally noted that testimony showed the law school engaged in both pre- and post-admission recruiting activities to enroll underrepresented minority students. *Grutter v. Bollinger*, 288 F.3d 732, 750 (6th Cir. 2002). Given this, and the evidence that significant numbers of underrepresented minority students cannot be enrolled unless race is explicitly taken into account, the Sixth Circuit found that the law school adequately considered race-neutral alternatives. *Id.* And, on this record, this Court agreed that the law school "sufficiently considered workable race-neutral alternatives". *Grutter*, 539 U.S. at 340.

2. The Record Here

The evidence adduced by the Law School showed that, like the University of Michigan, it has long recognized that application of conventional measures of academic merit disproportionately exclude capable minority applicants. Pet. at 29a.[4] Over the many years since it first implemented a race-conscious admissions policy, the Law School also sought to increase minority enrollment through measures other than admission preferences. Pet. at 35a. Despite its efforts to attract the most qualified minority applicants, at the times in question, the Law School recognized that, while an index based on LSAT scores and undergraduate grade point average is a fairly accurate predictor of first year law school performance, strict application of these measures continues to result in rejection of most qualified minority applicants. Tr. Vol. 2 at 213-14, 227-32; Tr. Ex. A-4. For example, only three African-Americans applied to the Law School in 1994 with scores at or above the average for all admitted

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[4] *See DeFunis v. Odegaard*, 82 Wash. 2d 11, 40, 507 P.2d 1169, 1186 (1973), *judgment vacated by DeFunis v. Odegaard*, 416 U.S. 312 (1974), *judgment reinstated by DeFunis v. Odegaard*, 84 Wash. 2d 617, 529 P.2d 438 (1974) ("the decision to consider race in interpreting a minority applicant's numerical grade averages and test scores was reached because of the opinion within the university that such standardized indicators inherently exclude a disproportionate number of minority applicants").

applicants, all of whom were admitted but none of whom enrolled. *Id.*[5]

A study performed for purposes of this litigation showed, without dispute, that application of admission rates at the Law School for non-minorities to minority applicants with the same grades and test scores would have resulted in classes that were 85-89% white (140-147 students per year), 7-9% Asian (12-15 students), 1-3% Hispanic (2-5 students), 0-2% African American (0-3 students), 0-1% Native American (0-2 students), and 0-1% Filipino (0-2 students). Tr. Ex. A-11.

To avoid this result, the Law School decreased emphasis on numeric measures in its 1989 admissions policy, focusing instead in all forms of diversity, including racial diversity. By slightly varying from the norms with respect to these numeric measures of merit, the Law School was able to admit and enroll significant numbers of highly qualified minorities (FF 82(i), Pet. at 49a; FF 83, Pet. at 52a) and thereby achieve its goal of improving the quality and richness of the educational experience. FF 21, Pet. at 32a-33a; Tr. Vol. 2 at 222-32.

In the face of this data and prevailing Ninth Circuit precedent,[6] petitioners did not argue at trial

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[5] There were only 78 African-American applicants in the entire country with grades and scores above these averages who applied to an accredited law school in 1993-94. Tr. Ex. A-3.

[6] *See Coral Constr. Co. v. King County*, 941 F.2d 910, 920 (9th Cir. 1990) ("the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the [affirmative action program]").

that the absence of a contemporaneous "affirmative finding" concerning the absence of race-neutral alternatives doomed the Law School's policy, nor did they argue that there was a lack of evidence to support the need for race-conscious measures generally. *See* Tr. Vol. 1 at 3-6 (opening statement); Tr. Vol. 5 at 741-86 (closing argument). Instead, petitioners focused their arguments on the narrower issue of whether the Law School had shown a need to give a "diversity plus" to Asian applicants. Tr. Vol. 5 at 750.

After the district court rejected this argument (Pet. at 53a-54a), petitioners renewed it on appeal. In the section of their opening brief entitled "Overbroad Preferences And The Failure To Consider Race Neutral Alternatives", petitioners argued that the Law School had failed to show a need for giving preference to Asians and more generally argued that the Law School gave too much weight to racial diversity. Pet'rs 9th Cir. Br. at 39-43. In their reply brief, they again focused on allegedly "overbroad preferences." Pet'rs 9th Cir. Reply Br. at 5-8.

Nowhere, at either the trial or appellate level, did petitioners suggest that the Law School's policy was defective for lack of a contemporaneous declaration that race-neutral alternatives were inadequate or that there was a lack of evidence to support such a conclusion; nor did they challenge the district's court's conclusion that "[c]onsideration of race in evaluating applications for admissions was necessary to achieve the goal of educational diversity at the Law School. Failure to consider race would have had the potential effect of denying many

qualified minority applicants an offer of admission to the Law School." FF 7, Pet. at 55a.

3. The Failure To Raise A Specific Challenge To The Need For The Use Of Race-Based Measures And The Congruity Of The Record Here With The Record In *Grutter* Requires Denial Of The Writ

This Court has long adhered to the principle that it will not grant certiorari to review questions not adequately raised below. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002); *United States v. Ortiz*, 422 U.S. 891, 898 (1975); *Duignan v. United States*, 274 U.S. 195, 200 (1927). Here, petitioners' former counsel (who are very experienced in litigation of this nature) made the choice to focus their attack on a narrow aspect of the Law School's justification for race-conscious measures. It is therefore highly disingenuous for new counsel to suggest (Pet. at 12) that the Ninth Circuit erred by failing to decide an issue that was never raised by their predecessors.

In any event, however, the record here is consistent with that in *Grutter* in showing the need for race-conscious measures and in supporting the Law School's conclusion regarding the absence of reasonable race-neutral alternatives. Petitioners' argument that this evidence and conclusion was not affirmatively documented at the time the admissions policy was adopted is not an adequate basis to grant review.

4. There Is No Circuit Conflict

Smith claims that the decision below conflicts with *Johnson v. Board of Regents of the University of Georgia*, 263 F.3d 1234 (11th Cir. 2001), and *Cavalier v. Caddo Parish School Board*, 403 F.3d 246 (5th Cir. 2005). Pet. at 14-16. *Johnson* and *Cavalier* are, however, factually distinguishable from the decision below and do not conflict with it.

Johnson involved an undergraduate admissions system very much like the one invalidated in *Gratz*. *Johnson*, 263 F.3d at 1257 ("UGA's policy is not only rigid and incomplete, the benefit it awards each and every non-white applicant is wholly, and concededly, arbitrary."). Furthermore, the University of Georgia did not attempt to defend its policy under narrow tailoring principles, other than to suggest that it was analogous to the "Harvard Plan" approved in Justice Powell's *Bakke* opinion. *Johnson*, 263 F.3d at 1261. Accordingly, and unlike the Law School, it made no effort to demonstrate the effect of eliminating race or address the tension between using valid measures of academic potential and the disparate impact that those measures have on many qualified minority candidates. *Id.* at 1259-60. There is no circuit conflict, because the Law School here made the showing that was deemed lacking in *Johnson*.

In *Cavalier*, a school district attempted to defend a race-based plan for assigning students to a middle school magnet program on the basis that the plan was permitted under a 20-year-old consent decree which had been designed to remedy past segregative practices in the district. The school

district had previously been granted unitary status, however, and the school board conceded that it could not justify the plan as necessary to remedy present effects of past illegal practices. *Cavalier*, 403 F.3d at 258-59. It also conceded that it had no other compelling interests that could justify its use of race. *Id.* Consequently, like the University of Georgia, it simply offered no evidence of consideration of race-neutral alternatives. *Id.* at 260. There is, therefore, no conflict between the holding here and the holding in *Cavalier*.

B. "Critical Mass"

In *Grutter*, the Court determined that the UMLS's goal of enrolling what it termed a "critical mass" of African-American, Hispanic, and Native American students did not transform that school's race-conscious program into a prohibited quota system. *Grutter v. Bollinger*, 539 U.S. 306, 335-36 (2003). Now, Smith asks this Court to decide whether the concept of "critical mass" imposes a lid on the number of minorities who may be admitted as a result of the type of holistic, individualized review approved by the Court in *Grutter*.

To set up this question, Smith posits "a program that had as its goal the enrollment of 50% minority students". Pet. at 19 & n.12. As the unchallenged findings of the district court establish, however, there is no basis for petitioners' assertion that the Law School had any kind of numeric goal or target that it sought to attain. Pet. at 4a; FF 88-89, Pet. at 53a; CL 11, Pet. at 57a. Furthermore, Smith again ignores the district court's unchallenged

finding that race "was never the sole determining factor" in admissions decisions. FF 60, Pet. at 42a.

When these factors are considered, it becomes apparent that petitioners' argument is really a plea to turn off consideration of racial diversity once a critical mass of minorities has been admitted, while presumably continuing consideration of all non-racial diversity factors. Framed in this manner, it becomes clear, as both the Ninth Circuit and the district court noted (Pet. at 18a; FF 92, 53a-54a), that petitioners' argument would violate this Court's instructions by at once imposing a maximum quota on minorities, while eliminating the Law School's ability to consider "all the ways an applicant might contribute to a diverse educational environment". *Grutter*, 539 U.S. at 337.

There is no reason for this Court to entertain this question and certainly no reason to do so on this record, which lacks facts even remotely supporting the premise on which it is based.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

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